

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE MUSSELMAN, *et al.*,

Plaintiffs,

V.

MARK NITCHMAN, *et al.*,

Defendants.

CASE NO. C04-0984RSM

MEMORANDUM ORDER
GRANTING IN PART AND
DENYING IN PART
DEFENDANT NITCHMAN'S
MOTION FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This matter comes before the Court on defendant Nitchman's second Motion for Summary Judgment. (Dkt. #67). Defendants argue that plaintiffs have failed during discovery to produce any evidence in support of their claims against defendant Nitchman, and therefore seek dismissal of plaintiffs' § 1983 claims, negligent infliction of emotional distress claim, Washington state discrimination claim, wrongful discharge claim, and breach of contract claim. Defendant also moves pursuant to Local Rule CR 7(g) to strike the affidavits in support of plaintiffs' response to the instant motion, arguing, *inter alia*, that they contain inadmissible evidence because they are not made with personal knowledge and because they contain

1 documents that have not been identified or authenticated. (Dkt. #84).

2 Plaintiffs argue that they have raised genuine issues of material fact, and therefore,
3 summary judgment is not appropriate. (Dkt. #72).

4 For the reasons set forth below, the Court agrees in part with plaintiff, and finds that
5 defendants' motion should be GRANTED IN PART and DENIED IN PART.

6 **II. DISCUSSION.**

7 **A. Background**

8 In this lawsuit, plaintiffs, one former and one current employee of the Washington State
9 Ferry ("WSF") system, claim that they were either fired or disciplined for speaking adversely
10 against Special Projects undertaken by management. The claims by each plaintiff are discussed
11 separately below.

12 Plaintiff Musselman was an employee of WSF for 20 years before being terminated in
13 2002. He primarily worked as an oiler. Between June of 2002 and August of 2002, Musselman
14 apparently heard that defendant Broxon, one of Musselman's managers, was involved in a
15 Special Project pertaining to lube oil used in the ferry engines. Musselman believed that the
16 study was a waste of public funds, and began questioning co-workers about the project, and
17 making comments that the project was a waste of money. Musselman alleges that after
18 defendant Allen, another WSF manager, heard him asking such questions, Allen began harassing
19 him at work. Musselman also apparently heard from a co-worker that Allen said he wanted to
20 fire Musselman for asking questions. Musselman also alleges that Allen tried to discredit him
21 among the union members, calling him a "crazy Vietnam vet," and other derogatory names.

22 During the same time period, defendant Nitchman, a senior manager at WSF, brought
23 discipline charges against Musselman. Musselman alleges these charges were brought as
24 retaliation for speaking out against the Special Project. Defendant Nitchman claims that the
25 charges were brought against Musselman as a result of a prior disciplinary hearing that occurred
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1 before Musselman began questioning the Special Project. Musselman was terminated on or
2 about October 25, 2002.

3 Musselman was subsequently informed by the union that they would not represent him in
4 a grievance procedure. Allen, Nitchman and Broxon were all senior union members at that time,
5 as well as WSF managers. It appears from the record that the six-month union grievance
6 procedure expired, and Musselman did not make a grievance. However, Musselman submitted
7 an unfair labor practice complaint to the Washington State Marine Employees Commission
8 ("MEC"). The MEC apparently told Musselman it would only hear his complaint if he removed
9 the claim that the WSF managers were also senior members of the union. Musselman
10 determined that pursuing any claim with the MEC would be futile, and declined to pursue the
11 complaint. He then submitted a tort claim form to the State of Washington, and subsequently
12 filed this lawsuit.

13 Plaintiff Newmon was hired as an oiler by WSF in December of 2000. At some point,
14 Newmon also learned of defendant Broxon's lube oil Special Project, and commented that the
15 study appeared to be a waste of public funds because a similar study had already been completed
16 by the oil companies and engine manufacturers. Newmon also questioned various co-workers
17 about how the study was being conducted. Broxon learned that Newmon had been asking
18 questions and allegedly assigned him to poor work assignments as a result. Newmon alleges
19 that Broxon also threatened him, stating that he should not speak against the Special Project
20 because "things can happen to people, things can happen to their family, and their house can get
21 burned down, because it is easy to find out where someone lives." Broxon also apparently told
22 Newmon about other WSF employees that had questioned Special Projects, who had been
23 demoted or injured as a result.

24 Newmon alleges that one day when he was being threatened, he decided he could no
25 longer work with Broxon because he feared for his safety, so he requested a replacement worker
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1 for his shift, and, when that replacement arrived, he left the ferry. Broxon then apparently
2 contacted defendant Nitchman, who charged Newmon with leaving his post and being
3 disrespectful to his supervisor. Newmon alleges that these charges were brought in retaliation
4 for speaking against the Special Project. Defendants claim that Newmon's discipline resulted
5 from failing to finish his shift, and walking away from his job.

6 Newmon then contacted the Washington State Patrol ("WSP") about the threats. The
7 WSP apparently informed him that he should speak with his union. Newmon determined that
8 contacting his union would be futile since his managers were also senior members. The WSF
9 staff chief apparently made a cursory investigation of the incident, and Broxon admitted to
10 making a statement to Newmon about a different employee who had questioned Special
11 Projects. Newmon subsequently participated in two disciplinary hearings, and eventually was
12 suspended for two weeks without pay, and given an adverse employment letter. Newmon then
13 filed a complaint with the Washington State Human Rights Commission. He requested a right-
14 to-sue letter, which was granted by the Commission. Newmon then submitted a tort claim form
15 to the State of Washington, followed by this lawsuit. Newmon remains an employee of WSF.

16 In their amended complaint, plaintiffs have also presented facts related to a pattern and
17 practice of retaliation against other employees who had previously spoken against Special
18 Projects, which resulted in harassment and false adverse employment complaints.

19 Plaintiffs have alleged seven causes of action, including violation of their right to free
20 speech pursuant to 42 U.S.C. § 1983, violation of procedural due process based on structural
21 bias pursuant to 42 U.S.C. § 1983, negligent infliction of emotional distress under Washington
22 State common law, Washington State common law outrage, violations of Washington State's
23 discrimination statute, wrongful discharge under Washington State common law, and breach of
24 contract under Washington State contract law. They request an award and damages in an
25 amount to be determined by the Court.

1 On December 2, 2004, defendants moved for summary judgment based on qualified
2 immunity. (Dkt. #19). The Court declined to grant summary judgment, finding that plaintiffs
3 had engaged in constitutionally-protected speech, that WSF's interests had not outweighed
4 Newmon's or Musselman's interest in expressing themselves, that defendants were on fair notice
5 that plaintiffs' speech was constitutionally protected and the law was clearly established at the
6 time of plaintiffs' conduct, that defendants' actions were not objectively reasonable, and
7 therefore, qualified immunity does not apply as a defense in this case. (Dkt. #42).

8 Defendants have now separately moved for summary judgment in favor of all of the
9 defendants, arguing that plaintiff has failed to produce any evidence during discovery, including
10 witnesses, testimony, or physical evidence, that would raise any genuine issue of material fact
11 requiring a trial in this case.

12 **B. Summary Judgment Standard**

13 Summary judgment is proper where "the pleadings, depositions, answers to
14 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
15 genuine issue as to any material fact and that the moving party is entitled to judgment as a
16 matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247
17 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See*
18 *F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*,
19 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a
20 genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or
21 the bald assertion that a genuine issue of material fact exists, no longer precludes the use of
22 summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics,*
23 *Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

24 Genuine factual issues are those for which the evidence is such that "a reasonable jury
25 could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Material facts are
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1 those which might affect the outcome of the suit under governing law. *See id.* In ruling on
 2 summary judgment, a court does not weigh evidence to determine the truth of the matter, but
 3 “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d
 4 547, 549 (9th Cir. 1994) (citing *O’Melveny & Meyers*, 969 F.2d at 747).

5 **C. Motion to Strike Affidavits Under Local Rule 7(g)**

6 As a threshold matter, the Court first addresses defendant’s request to strike the
 7 affidavits of Marable, Newmon, Stell, Kuykendall and Hart, which were submitted in support of
 8 plaintiffs’ response to the instant motion. (See Dkt. #84 at 2). Defendant argues that the
 9 affidavits in question do not meet the criteria set forth in Rule 56(e) of the Federal Rules of Civil
 10 Procedure, which states that affidavits in support of, or opposition to, summary judgment “shall
 11 be made on personal knowledge, shall set forth facts as would be admissible in evidence, and
 12 shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

13 Fed. R. Civ. P. 56(e).

14 The Ninth Circuit Court of Appeals has often rejected statements contained in affidavits
 15 that are based on information and belief, rather than on personal knowledge. *See, e.g.*,
 16 *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529
 17 (9th Cir. 1991), *aff’d*, 508 U.S. 49 (1993). Likewise, courts have determined that where it is
 18 not self-evident “from his job title or the activities which he describes in the affidavit” an affiant
 19 is not competent to testify to the matters stated within his affidavit, and striking such statements
 20 is appropriate. *See, e.g.*, *Ramada Franchise Systems, Inc. v. Tresprop, Ltd.*, 75 F. Supp.2d
 21 1205, 1209 (D. Kan. 1999). The Court has reviewed the affidavits and declarations at issue in
 22 this case, and finds as follows:

23 *1. Mr. Newmon’s Affidavit*

24 In his affidavit, Mr. Newmon has not sworn that the statements contained therein are
 25 based on personal knowledge. Rather, many of his statements begin with the qualifier “I

1 believe.” Accordingly, those sentences, contained in paragraph numbers 3, 5, 8, 14, 16 and 17,
2 are hereby STRICKEN, and the Court will not consider the statements when making its decision
3 below. In addition, it is not evident from Mr. Newmon’s job description as an oiler aboard the
4 Walla Walla, or from the activities which he describes, that he is competent to testify to Mr.
5 Broxon’s employment status or special projects work, or to Mr. Kathlean’s employment aboard
6 the Walla Walla. Accordingly, the Court also STRIKES the second sentence of paragraph 2, the
7 first sentence of paragraph 7, and paragraphs 3, 5 and 8 in their entirety. The remainder of Mr.
8 Newmon’s affidavit appears to be based on his personal knowledge of, or involvement in, the
9 activity he is describing, and will not be stricken.

10 *2. Mr. Stell’s Declaration*

11 The majority of Mr. Stell’s declaration appears to be based on his personal knowledge
12 of, or involvement in, the activity he is describing, and will not be stricken. However, the Court
13 will STRIKE the last sentence of paragraph 4, which is based only on Mr. Stell’s “belief.”

14 *3. Mr. Kuykendall’s Declaration*

15 The majority of Mr. Kuykendall’s declaration appears to be based on his personal
16 knowledge of, or involvement in, the activity he is describing, and will not be stricken.
17 However, the Court will STRIKE the last sentence of paragraph 4, which is based only on Mr.
18 Kuykendall’s “belief.”

19 *4. Mr. Marable’s Declaration*

20 Much of Mr. Marable’s declaration is based on “anecdotal evidence,” or statements
21 “heard” from other persons. It is not evident from Mr. Marable’s job description as a chief, or
22 from the activities which he describes, that he is competent to testify to much of the evidence he
23 attempts to introduce with those statements. Moreover, a substantial portion of Mr. Marable’s
24 declaration is based on inadmissible hearsay. Accordingly, the Court STRIKES all of paragraph
25 3 except for the first sentence, those portions of paragraph 6 that pertain to Nitchman’s actions
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1 and the Oil Eater 99, sentence one of paragraph 8, sentence one of paragraph 12, and
 2 paragraphs 4, 10, 13, 14 and 15 in their entirety.

3 *5. Mr. Hart's Declaration*

4 Mr. Hart's declaration is made in his capacity as plaintiffs' attorney in this case, and
 5 presents several documents as evidence for this Court's consideration. Mr. Hart states, under
 6 the penalty of perjury, that each document is a true and correct copy. It is not clear from the
 7 declaration whether the statements are based on personal knowledge; however, many of the
 8 documents are those created by Mr. Hart, or submitted to this Court in their original forms by
 9 Mr. Hart. (*See* Exs. 1, 2, 3 and 8). In addition, Mr. Hart has submitted copies of documents he
 10 received in response to his own discovery requests. (*See* Exs. 4, 5 and 6). Accordingly, the
 11 paragraphs related to those exhibits will not be stricken. However, it appears that there are
 12 several documents to which it is not evident from Mr. Hart's affidavit that he is competent to
 13 testify. Accordingly, paragraphs 7, 8 and 10, along with the corresponding Exs. 6, 7 and 9, shall
 14 be STRICKEN in their entirety. *See American Rock Salt Co., LLC v. Norfolk Southern*, 180 F.
 15 Supp.2d 420, 423 (W.D.N.Y. 2001) (explaining that an attorney's affidavit that is not based on
 16 personal knowledge carries no weight and should be disregarded); *Foster v. Allied Signal, Inc.*,
 17 98 F. Supp.2d 1261, 1265 (D. Kan. 2000) (striking an attorney affidavit that contained hearsay
 18 statements and unauthenticated documents).

19 **D. Alleged § 1983 Violations**

20 Plaintiffs first allege that defendant Nitchman violated their civil rights under 42 U.S.C.
 21 § 1983 by acting under "a policy, practice, or custom of harassing, threatening, and subjecting to
 22 adverse employment actions employees who stated that one or more of the Special Projects are
 23 a waste of time." (Dkt. #63 at 11). Specifically, plaintiffs allege that defendant Nitchman:

24 (1) . . . directly participated in the violations of Plaintiffs' rights, (2) . . . failed
 25 to remedy the Plaintiffs' rights after learning of them, (3) . . . created or
 26 maintained the policies or customs under which unconstitutional practices
 occurred, (4) . . . exercised gross negligence in supervising Broxon and Allen,

1 and (5) . . . exhibited deliberate indifference by failing to act on information
2 indicating that unconstitutional violations were occurring.

3 (Dkt. #63 at 11-12). Plaintiffs further allege that defendant Nitchman:

4 violated . . . Plaintiffs' procedural due process rights under the Fourteenth
5 Amendment by acting as decisionmaker for bringing the charges against
6 Plaintiffs and acting as the decisionmaker at the disciplinary hearings of
7 retaliatory disciplinary charges brought after Plaintiffs stated one or more
8 Special Projects appeared to be a waste of funds. Nitchman receives direct
9 and/or indirect benefits for approving and/or not objecting to the Special
10 Projects; and/or manages the Special Projects. Nitchman had a direct,
11 personal, and substantial pecuniary interest in the proceedings. Nitchman also
12 had a strong motive to rule in a way that would aid the institution because of
13 his institutional responsibilities.

14 (Dkt. #63 at 12-13).

15 Defendant argues that plaintiffs are unable to show that he was personally involved with
16 any of the alleged constitutional deprivations, or that he knew any were occurring, and therefore
17 urges the Court to dismiss these claims against him.

18 In order to maintain a civil rights action under 42 U.S.C. § 1983 against a state official,
19 plaintiffs must demonstrate that such official played an affirmative part in the alleged deprivation
20 of constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Tribble v. Gardner*, 860
21 F.2d 321, 327 (9th Cir. 1998); *King v. Atiyeh*, 814 F.2d 565 (9th Cir. 1987). A defendant may
22 be found to have been "personally involved" in a constitutional deprivation if he or she: (1)
23 directly participated in the infraction; (2) failed to remedy a wrong after learning of the violation;
24 (3) created or allowed a policy to continue under which the violations occurred; or (4) was
25 grossly negligent in managing the subordinates who caused the unlawful condition or event.
26 *Williams v. Smith*, 781 F.2d 319 (2nd Cir. 1986).

27 In the instant case, Nitchman's direct involvement with plaintiffs appears to be limited to
28 conducting the discipline hearings, which plaintiffs allege were held in retaliation for questioning
29 defendant Broxon's lube oil Special Project. Defendant Nitchman now argues, as he did
30 previously, that the evidence demonstrates that employment decisions with respect to both

1 Newmon and Musselman were taken not for retaliatory reasons, but for other valid purposes.
2 Specifically, in Musselman's case, defendant Nitchman argues that Musselman's employment
3 was terminated as a result of a disciplinary proceeding that took place prior to his speaking out
4 against Special Projects. In Newmon's case, defendant Nitchman argues that Newmon's
5 disciplinary action resulted from walking off the job and his failure to finish his shift.

6 However, the Court rejected this argument in its prior order on defendants' motion for
7 summary judgment. (See Dkt. #42 at 11-12). As the Ninth Circuit Court of Appeals explained
8 in *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), proof of motive is a question of fact that
9 should be left for trial. "It is possible that they will be able to show at trial that the adverse acts
10 [plaintiff] alleges were not taken in retaliation for his constitutionally protected speech.
11 However, 'as with proof of motive in other contexts, this element of a First Amendment
12 retaliation suit . . . involves questions of fact that normally should be left for trial.'" *Ceballos*,
13 361 F.3d at 1181 (citations omitted). Accordingly, the Court agrees with plaintiff that Cause of
14 Action One should not be dismissed.

15 As for plaintiffs' Cause of Action Two, the Court is not convinced that plaintiffs have
16 raised any genuine issue of material fact with regard to defendant Nitchman's actions. Plaintiffs
17 essentially allege that defendant Nitchman violated their civil rights during the disciplinary
18 hearings he conducted by his receipt of direct or indirect benefits from the Special Projects, and
19 because of his direct, personal and substantial pecuniary interests in the disciplinary proceedings.
20 Plaintiffs argue that defendant Nitchman had both a clear structural bias and personal interest
21 and a structural bias and institutional interest in the outcome of the disciplinary hearings.
22 Defendant Nitchman argues that plaintiffs have produced no evidence that he was influenced
23 during the proceedings by anything other than the evidence that he heard. The Court agrees.

24 While plaintiffs have produced a number of documents purporting to demonstrate
25 defendant Nitchman's biases, many of those documents have been stricken, *supra*, because
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1 plaintiffs' attorney does not have the requisite personal knowledge to testify to the validity of
2 those documents, and many other of the documents are simply irrelevant to plaintiffs'
3 arguments. For example, whether defendant Nitchman was responsible for the accounting for
4 his department, whether he was a member of the union and was eligible for Special Project
5 funds, and whether he was interviewed by the Bremerton Sun, do not in and of themselves prove
6 personal or institutional bias. Finally, the allegation that defendant Nitchman has entered into
7 quid pro quo agreements with employees on Special Projects is mere speculation at this point,
8 and many of the statements in support of that allegation have also been stricken. Accordingly,
9 the Court finds that plaintiffs may not maintain a claim of structural bias against defendant
10 Nitchman.

11 **E. Negligent Infliction of Emotional Distress**

12 In their Third Cause of Action, plaintiffs assert the state law claim of negligent infliction
13 of emotional distress against defendant Nitchman. In order to succeed on this claim, plaintiffs
14 must prove objective symptoms of emotional distress, and they must assert a separate factual
15 basis for their claim than that of the retaliation claim. In *Haubry v. Snow*, 106 Wn. App. 666
16 (2001), the Washington State Court of Appeals laid out the standard for a negligent infliction of
17 emotional distress claim, explaining that:

18 [a]n employee may recover damages for emotional distress in an employment
19 context, but only if the factual basis for the claim is distinct from the factual
basis for the discrimination claim.

20 Here, there is no separate compensable claim because the factual basis for the
21 emotion distress claim is the same as the sexual harassment or discrimination
claim.

22 . . .

23 A claim for the negligent infliction of emotional distress also requires that
24 Haubry establish that the emotional distress is manifested by objective
symptoms. To satisfy the objective symptomatology requirement established
in the case of *Hunsley v. Giard*, Haubry's emotional distress must be
susceptible to medical diagnosis and proved through medical evidence.

25 *Haubry*, 106 Wn. App. at 678.
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1 In the instant case, the factual basis of plaintiffs' negligent infliction of emotional distress
2 claim is the same as the factual basis for their retaliation claim - namely that defendant Nitchman
3 took adverse employment actions as a result of plaintiffs' inquiries in the lube oil special project.
4 (See Dkt. #72 at 18). Moreover, plaintiffs have produced no medical evidence of objective
5 symptoms of such distress. Plaintiff Musselman has provided no proof that he obtained medical
6 or other treatment, nor has he provided any diagnosis upon which he bases his claim. Plaintiff
7 Newmon has produced only one medical report and a medical bill, which have not been
8 authenticated. Therefore, the Court finds that neither plaintiff has raised a genuine issue of
9 material fact in regard to their claim, and summary judgment in favor of defendant is
10 appropriate.

11 **F. Alleged RCW 49.60 Violations**

12 Plaintiffs' Fifth Cause of Action asserts violations by defendant Nitchman under RCW
13 49.60, Washington State's law against discrimination. Specifically, plaintiffs allege that
14 defendant Nitchman violated RCW 49.60.210(2). That statute states in relevant part, “[i]t is an
15 unfair practice for a government agency or government manager or supervisor to retaliate
16 against a whistleblower as defined in chapter 42.40 RCW.” RCW 49.60.210(2). RCW
17 42.40.020 defines a whistleblower as:

18 . . . an employee who in good faith reports alleged improper governmental
19 action to the auditor, initiating an investigation under RCW 42.40.040. For
20 purposes of the provisions of this chapter and chapter 49.60 RCW relating to
21 reprisals and retaliatory action, the term “whistleblower” also means: (a) An
22 employee who in good faith provides information to the auditor in connection
23 with an investigation under RCW 42.40.040 and an employee who is believed
24 to have reported improper governmental action to the auditor or to have
provided information to the auditor in connection with an investigation under
RCW 42.40.040 but who, in fact, has not reported such action or provided
such information; or (b) an employee who in good faith identifies rules
warranting review or provides information to the rules review committee, and
an employee who is believed to have identified rules warranting review or
provided information to the rules review committee but who, in fact, has not
done so.

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26 RCW 42.40.020(8).

1 Defendant Nitchman argues that plaintiffs' claim should be dismissed because they have
2 provided no evidence that they are statutory whistleblowers. It appears that, in particular,
3 defendant Nitchman believes plaintiffs have not provided evidence that they reported any
4 information to the office of the State Auditor. The Court finds this argument misguided in
5 regard to plaintiff Musselman. Plaintiff Musselman has declared that he made several telephone
6 calls to the Auditor's office regarding Special Projects. Indeed, the Court took note of this fact
7 in its prior order denying summary judgment. (Dkt. #42 at 9). However, the Court agrees that
8 Newmon has not proven that he is a statutory whistleblower. Plaintiff Newmon merely alleges
9 that because defendant Broxon told him to stop talking about the Special Projects, he is an
10 employee believed to have made reports to the State Auditor. There is nothing in defendant
11 Broxon's statement that even hints he believed plaintiff Newmon had been speaking to the
12 auditor. Therefore, the Court finds that plaintiff Newmon's whistleblower claim must be
13 dismissed.

14 **G. Wrongful Discharge**

15 Plaintiffs' Cause of Action Six alleges that defendant Nitchman discharged plaintiff
16 Musselman in violation of public policy and without just cause. Defendant Nitchman argues that
17 this claim should be dismissed because plaintiff Musselman is not a statutorily defined
18 whistleblower under Washington State law. The Court has already rejected that argument,
19 *supra*, and therefore finds that Cause of Action Six should not be dismissed.

20 **H. Breach of Contract**

21 Finally, plaintiffs' Cause of Action Seven asserts a breach of contract claim against
22 defendant Nitchman, alleging that the plaintiffs were beneficiaries of a collective bargaining
23 agreement between the WSF and the Marine Engineers Beneficial Association ("MEBA"), the
24 union to which plaintiffs belong, and Nitchman breached that agreement by allowing members of
25 the WSF management to maintain their active membership in the MEBA.

1 Defendant Nitchman argues that the contract in question was not formed between
2 himself, individually, and the MEBA. Rather, the contract was formed between the WSF, who
3 is not a party to this litigation, and the MEBA. Thus, there is no duty under the contract due to
4 plaintiffs by defendant Nitchman in his individual capacity.

5 Plaintiff answers that defendant Nitchman materially breached the collective bargaining
6 agreement for his own personal benefit, and that he violated the duty of good faith and fair
7 dealing by taking actions for his individual benefit and by causing the MEBA and WSF to
8 protect members of management who were MEBA members and who were involved in Special
9 Projects. The Court is not persuaded. Plaintiffs present no evidence in support of these bare
10 and conclusory allegations. Moreover, plaintiffs have sued defendant Nitchman only in his
11 individual capacity, not in his capacity as the Director of Fleet and Maintenance Preservation.
12 As noted above, defendant Nitchman did not form the contract in question with the MEBA in
13 his individual capacity. Therefore, the Court finds that plaintiffs may not maintain their breach
14 of contract claim against defendant Nitchman.

III. CONCLUSION

16 Having reviewed defendant Nitchman's second motion for summary judgment (Dkt.
17 #67), plaintiffs' opposition (Dkt. #72), defendant's reply (Dkt. #84), the declarations and
18 evidence in support of those briefs, and the remainder of the record, the Court hereby GRANTS
19 IN PART and DENIES IN PART defendant's motion for summary judgment (Dkt. #67) as
20 follows:

21 (1) Cause of Action One, which asserts a § 1983 claim of retaliation based on protected
22 speech under the First Amendment, remains pending against defendant Nitchman for the reasons
23 set forth above;

24 (2) Cause of Action Two, which asserts a § 1983 claim of employment discrimination
25 based on structural bias, is hereby DISMISSED against defendant Nitchman for the reasons set
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1 forth above;

2 (3) Cause of Action Three, which asserts a claim for negligent infliction of emotion
3 distress, is hereby DISMISSED against defendant Nitchman for the reasons set forth above;

4 (4) Cause of Action Five, which asserts a retaliation claim for whistleblowing against
5 defendant Nitchman, is DISMISSED IN PART, in that plaintiff Newmon may not assert such
6 claim, but plaintiff Musselman's claim remains pending for the reasons set forth above;

7 (5) Cause of Action Six, which asserts a claim of wrongful discharge of plaintiff
8 Musselman, remains pending against defendant Nitchman for the reasons set forth above;

9 (6) Cause of Action Seven, which asserts a claim for breach of contract, is DISMISSED
10 against defendant Nitchman for the reasons set forth above;

11 The Clerk shall forward a copy of this Memorandum Order to all counsel of record.

12 DATED this 5 day of July, 2005.



13
14 RICARDO S. MARTINEZ
15 UNITED STATES DISTRICT JUDGE
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